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Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

WILLIAM C. CRONAN, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM C. CRONAN respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on December 8, 1960 affirming an order of the Federal Communications Commission dated April 27, 1960 and released May 2, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported and is appended hereto as Appendix. The opinion of the Federal Communications Commission is not re-

ported and appears in the Joint Appendix submitted to the Court of Appeals at J.A. 92-102.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered on December 8, 1960. No application for rehearing was made. Jurisdiction is conferred upon this Court by the Communications Act of 1934, as amended, 47 U.S.C. § 402(j) and by 28 U.S.C. § 1254.

QUESTIONS PRESENTED

Petitioner was required as a condition for renewal of his radio telephone and telegraph operators licenses to answer a questionnaire, in writing, under oath whether he was then or ever had been a member of the Communist Party or any organization advocating the forceful overthrow of the United States or of any political subdivision. These inquiries are not asked of all applicants for licenses or renewals. Petitioner's refusal to comply resulted in a hearing in which no evidence was presented by the Government as to why the additional information was required of petitioner but not of other applicants for renewal.

The questions presented in this case are:

1. Does the questionnaire on its face, or as construed and applied, violate the due process clause of the Fifth Amendment to the United States Constitution in depriving petitioner of liberty or property without a fair trial or fair hearing, accusation, the right of confrontation, the right to cross examination, in subverting the presumption of innocence, and in altering the rules of evidence?

2. Does the questionnaire on its face, or as construed and applied, deprive the petitioner of freedom of speech and assembly protected by the First Amendment?

3. Does the Federal Communication Commission have the statutory authority to require an applicant for renewal

of a radio operators license to furnish the information requested?

4. Does the Commission have the power and authority to impose on petitioner a requirement not made of license applicants generally and not set forth in its rules and regulations?

5. Is the petitioner being unreasonably and discriminatorily deprived of his rights under the due process clause of the Fifth Amendment in that the questionnaire is made a condition for his license renewal but is not required of others generally?

6. Did the Commission follow the proper procedure in its hearing on the issues involved herein?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Constitutional provisions involved are the First and Fifth Amendment.

The Statutes involved are:

Section 303 of the Communications Act, as amended, the relevant portions of which are:

> "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> (1) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified, except that in issuing licenses for the operation of radio stations on aircraft the Commission may, if it finds that the public interest will be served thereby, waive the requirement of citizenship in the case of persons holding United States pilot certificates or in the case of persons holding foreign aircraft pilot certificates which are valid in the

United States on the basis of reciprocal agreements entered into with foreign governments;

(m)(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States (which the Commission is authorized to administer,) or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means."

Sections 2 and 8 of the Administrative Procedure Act of 1946 which read, in part, as follows:

2. "Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Every agency shall separately state and currently publish in the Federal Register . . . . (2) state-

ments of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

8. "In the exercise of any power or authority—

. . . . (b) In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 1006 and 1007 of this title or other proceedings required by laws and shall make its decision. Except in cases of wilfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements . . . ."

The pertinent sections of the Rules and Regulations of the Federal Communications Commission are 1.71(a), (c) and (d) which read:

(a) "Upon acceptance for filing of an application for a new commercial operator license, an examination is conducted where required, by the field office with which the application is filed in accordance with Part 13 of this chapter. If applicant passes the examination and is found qualified in respect to citizenship, character, and physical condition, the license will be issued.

Where doubts as to citizenship, character, or physical condition arise, the application is referred to the Commission's Inspection and Examination Division, Field Engineering and Monitoring Bureau, Washington, D.C., for consideration. If it appears that further information is required to determine the applicant's qualifications or that a grant of the application will not serve the public interest, the applicant will be notified in writing and given an opportunity to furnish such written showings as the Commission may request and as the applicant may desire to submit. If, from the information furnished, it does not appear that the applicant is qualified or that the public interest would be served by a grant of the application, the applicant will be advised thereof in writing and given the opportunity to request, within the period of time to be specified in writing, that the application be set for hearing. In case of failure timely to request such hearing, the application will be denied."

(c) "Applications for renewal of license after acceptance for filing are handled in accordance with the procedure contained in paragraph (a) of this section, except that no examination is required unless the circumstances as set forth in Sec. 13.28 of this chapter exist, in which case a renewal examination will be required."

(d) "Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice where an application has not yet been designated for hearing; such dismissal may be made with prejudice after an application has been designated for hearing."

STATEMENT OF THE CASE

Petitioner had been issued a first class radio telegraph operator license which had an expiration date of May 23, 1956 (J.A. 3) and a first class radio telephone operator license, which had an expiration date of March 5, 1957. Neither of said licenses had ever been suspended or revoked

by the Federal Communications Commission, nor had petitioner ever been notified of charges against him or the institution of agency proceedings for the withdrawal, suspension or revocation of said licenses.

In March, 1956 petitioner executed an application for renewal of his radiotelephone operator license on the form prepared by the Commission therefor. (J.A. 1). On April 24, 1956 the Commission wrote him a letter informing him that it required additional information before taking action with respect to said application. (J. A. 14). A questionnaire was attached to the letter and the petitioner was requested to answer, under oath, the following questions:

> "1. Are you now or have you ever been a member of the Communist Party? If the answer is yes, give dates of membership.
>
> 2. Are you now or have you ever been a member of any organization or group which advocates or teaches the overthrow of the Government of the United States or of any political subdivision thereof, by force or violence? If the answer is yes, list the organization or group and give the dates of membership." (J. A. 44-45).

Petitioner informed the Commission that he declined to answer such questions on the ground that the Commission did not have the legal authority to require answers to such questions as a condition of the renewal of his license and further on the ground that the requirement of the Commission was an infringement of his constitutional rights and that the questions were not pertinent, relevant, legal, or constitutional (J. A. 47).

On March 18, 1957 petitioner filed an application for renewal of his first class radiotelegraph operator license (J. A. 6-7). A questionnaire identical to that set forth above was sent to him on May 13, 1957 with a request from the Commission that he answer the questions under oath.

Petitioner declined to answer on the same grounds set forth above (J. A. 49).

By order of July 30, 1958, the Commission designated both petitioner's applications for hearing upon the following issues:

1. To determine whether William C. Cronan failed to answer lawful questions with respect to his qualifications to be a licensee which the Commission had directed him to answer under oath;

2. To determine in the light of the evidence adduced under Issue 1 whether William C. Cronan possesses the necessary qualifications to hold a radio operator license (J. A. 59, 92, 93).

The Initial Decision of the Hearing Examiner held that the Commission had the authority to ask the questions and dismissed petitioner's applications for license renewal (J. A. 59-87). The decision was upheld by the Commission (J. A. 92-102).

The Commission concedes that the application forms filed by petitioner were properly completed and executed (J. A. 63) and that there are no outstanding records of violations by him of any of the Commission's Rules or operating procedures (J. A. 64). The Commission also concedes that the questions asked of petitioner have not been asked of all other applicants for radio operator licenses or for renewals thereof (J. A. 35).

Thus, the facts in this proceeding are without controversy, the only issues being those of law.

REASONS FOR GRANTING THE WRIT

1. This Court has recently stated that governmental agencies must use the procedures which have traditionally been associated with the judicial process when they adjudicate or make binding determinations which directly affect

the legal rights of individuals. *Hannah* v. *Larche*, 363 U.S. 420 at p. 442.

Licensing, the governmental action in issue in this case, was cited by the Court as a proceeding entailing judicial procedures. In discussing *Greene* v. *McElroy*, 360 U.S. 74, the Court said:

> "The governmental action there reviewed was certainly of a judicial nature. The various Security Clearance Boards involved in *Greene* were not conducting an investigation; they were determining whether Greene could have a Security clearance—a license in a real sense, and one that had a significant impact upon his employment." *Hannah* v. *Larche*, *supra* at p. 452.

Here, as in *Greene*, the Commission was engaged, not in general fact finding, but in determining petitioner's legal rights.

There is no authority to support the Commission's position that there it may conduct a pre-adjudicatory investigation during such proceedings. On the contrary, the Court has made it clear that due process requirements must be met from the inception. In *Speiser* v. *Randall*, 357 U.S. 513, the Court struck down a requirement that applicants for tax exemptions submit a political affidavit on the ground that it violated due process by placing the burden of proof on the taxpayer. Procedural requirements are equally high where, as here, the right to earn a livelihood is affected. Cf. *Greene* v. *McElroy*, *supra*, *Parker* v. *Lester*, 227 F. 2d 708 (C.A. 9, 1955).

Nor can the constitutional violation be cured by belated observance of procedures such as the hearing offered petitioner in the event that he filled in the questionnaire. In such a hearing the sworn testimony elicited from petitioner would be introduced against him; it would therefore be as meaningless a formality as the hearing actually held, in

which the real issue, whatever charges caused the Commission to demand answers to its questions, was excluded from consideration.

2. Moreover, the standard which would be applied in such a hearing is vague and inadequate. The Commission, in a brief submitted to the United States Court of Appeals in *Borrow* v. *Federal Communications Commission*, No. 15,473, June 30, 1960, cert. denied, 364 U.S. 892, Nov. 14, 1960, stated that the determinative factors are "subjective and can best be ascertained from appellant himself." They are not established by statute or regulation. Petitioner cannot be required to comply with standards unless they are made part of published procedures. Administrative Procedure Act, Section 8.

In 1955, the Commission proposed a regulation which would have prohibited the issuance of radio operator licenses to members of the Communist Party. (Dockets Nos. 11060 and 11061). It must be assumed that the Commission has not made the requisite finding that government interest compelled this prohibition, as the regulations have not been promulgated.

Without a finding of compelling interest the Commission assumes a power denied to Congress, to impinge upon constitutionally protected liberties on the basis of "[m]ere legislative preferences or beliefs." *American Communications Association* v. *Douds*, 339 U.S. 382, 400.

If such a finding is made, Congress, not the Commission, must make it. Otherwise, decisions of great constitutional import and effect would be delegated to administrators. *Greene* v. *McElroy, supra* at p. 507.

3. As administrators are not authorized to make such decisions, the Court has held that authority to limit or restrict constitutional rights may not be inferred from general powers, but must be found in specific statutory language. *Greene* v. *McElroy, supra; Kent* v. *Dulles*, 315 U.S. 116.

The Commission concedes that the Communications Act of 1934 does not expressly authorize it to inquire into the political affiliations of radio operator licensees, or to deny licenses on the basis of political beliefs.

In the absence of a clear, unambiguous grant of authority from Congress, the Commission may not consider petitioner's politics in determining his qualifications for a radio operator license.

4. In *National Broadcasting Co.* v. *United States*, 319 U.S. 190, this Court declared that "Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views . . ."

The Commission's lack of authority to refuse or suspend a license for political activities is evidenced by legislative and administrative history.

In 1940, a bill, H.R. 10446, was introduced to amend the Communications Act to empower the Commission to refuse a license to a "subversive". The bill died in Committee, was introduced the next year, and suffered the same fate. In 1941, H.R. 2662, which would have authorized the Commission to deny licenses to subversives using them in maritime occupations, was introduced. It, too, died in Committee, although its sponsor explained that the Commission had stated that it had no authority to revoke or deny licenses for subversive activities. (See Hearings on H.R. 2662, House Committee on Merchant Marine and Fisheries, 77th Cong., 1st Sess., Feb. 26, 1941, p. 10 ff.)

A similar bill, H.R. 5074, was introduced in 1941 and failed to pass despite testimony that the Commission lacked the power to screen radio operators from shipping on the basis of their political affiliations. (See Hearings on H.R. 5074, Senate Committee on Commerce, 77th Cong., 1st Sess., p. 71).

Finally, from 1927, the date of the first radio act, to 1954, when the Commission initiated the practice in issue

in the present case of requiring selected license applicants to file political questionnaires, there is no evidence that the Commission ever claimed the power to apply political criteria. This period included World War II and the Korean War, as well as the amendment of the Communications Act pursuant to which the Commission was given responsibility for Project CONELRAD, a program utilizing communications facilities for national security and defense. It is significant that neither the statute nor the Executive Order authorizing CONELRAD provided for a loyalty-security program for radio operator licensees.

And, as is noted above, the Commission's position that it has the authority to apply political tests to selected applicants is undermined by its failure to promulgate proposed regulations prohibiting the issuance of radio operator licenses to members of the Communist Party.

5. This Court has recently held that the First Amendment protects members of organizations engaged in the advocacy of particular beliefs from compulsory disclosure of their affiliation. *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449; *Bates* v. *City of Little Rock*, 361 U.S. 516. In the *NAACP* case, the court emphasized the importance of inviolability of privacy where the group espouses dissident beliefs. Members in the Communist Party have the same constitutional protections afforded others. Cf. *Yates* v. *United States*, 345 U.S. 298.

6. The list of occupations licensed by governmental agencies is large, and it is growing.[1] The issue in this case is therefore of broad significance. If one licensing agency can ask selected applicants to disclose their political affiliations and deny licenses to those who fail to answer, or whose answer is displeasing, any agency can do the same.

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[1] Gellhorn, Individual Freedom and Government, 1956, p. 106.

There is no reason to believe that the Commission's expertise on engineering and other technical aspects of communications better equips it to pass upon constitutional matters than does the special knowledge of agencies which supervise our railroads or air transportation. And such agencies may well believe that pilots and railroad engineers play as vital a role in times of national emergency as radio operators.

Thus, unless the decision in this case is overruled, many may be deprived of licenses, and of their livelihood, by administrators who by their training are unqualified to decide, or even recognize, constitutional questions and "who, under our system of government, are not endowed with authority to decide them." *Greene* v. *McElroy*, *supra*, at p. 507. If those engaged in private businesses are to be so restricted, it must be as a result of clear and specific legislative mandate, in accordance with carefully delineated procedures.

The issue in this case has never been decided by this Court and it presents a significant test of the authority of an administrative agency.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

March 7, 1961

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15760

WILLIAM C. CRONAN, *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

Appeal from a Decision and Order of the Federal Communications Commission

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Decided December 8, 1960

Miss Shirley Fingerhood, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, and *Mr. Lawrence Speiser* for appellant.

Mrs. Ruth V. Reel, Counsel, Federal Communications Commission, with whom *Messrs. John L. FitzGerald*, General Counsel, Federal Communications Commission, and *Max D. Paglin*, Assistant General Counsel, Federal Communications Commission, were on the brief, for appellee.

Before MR. JUSTICE REED, retired,* and WILBUR K. MILLER, *Chief Judge*, and BURGER, *Circuit Judge*.

BURGER, *Circuit Judge:* Appellant filed an application with the Federal Communications Commission seeking renewal of his radiotelegraph and radiotelephone operator's licenses. The Commission by letter asked him to answer under oath questions with respect to his membership in the Communist Party or any group which advocates over-

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* Sitting by designation pursuant to Section 294 (a), Title 28, U.S. Code.

throw of a government of the United States by force or violence. Appellant refused to answer these questions, and, after a hearing limited to the issue of failure to answer, the Commission dismissed the application for failure to comply with its request.

That the Commission has statutory and constitutional authority to ask these questions is established by this court's recent decision in *Borrow* v. *Federal Communications Commission*, No. 15,473, June 30, 1960, *cert. denied*, 29 U.S.L. WEEK 3146 (U.S. Nov. 14, 1960).

Appellant claims that if the Commission desires this information, it must so announce by rule rather than proceed on an *ad hoc* basis. However, the regulations specifically provide that "if it appears that further information is required to determine the applicant's qualifications . . . the applicant will be notified in writing and given an opportunity to furnish such written showings as the Commission may request and as the applicant may desire to submit. . . ." and that, "failure to respond to official correspondence or request for additional information will be cause for dismissal." 47 C.F.R. 1.71 (a), (d). *Cf. Graham* v. *Richmond*, 106 U.S. App. D.C. 288, 272 F. 2d 517 (1959), where no such regulation existed. Moreover, the Commission is not required to state by rule all the elements of character fitness with respect to which it may desire to make inquiry. *Mester* v. *United States*, 70 F. Supp. 118 (E.D.N.Y.), *aff'd per curiam*, 332 U.S. 749 (1947).

Affirmed.

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SUPREME COURT, U.S.
JAMES R. BROWNING, CLERK

No. 792

In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM C. CRONAN, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D. C.

MAX D. PAGLIN,
General Counsel,

JOSEPH V. REEL,
Counsel,

Federal Communications Commission,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 792

WILLIAM C. CRONAN, PETITIONER

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FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

The decision of the court below involves precisely the same issue decided in *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666 (C.A. D.C.), in which case this Court denied certiorari earlier this Term. 364 U.S. 892. Moreover, the facts are also the same. An applicant for renewal of radio operator licenses refused to answer questionnaires in which he was asked whether he was, or had been, a member of the Communist Party or other organiza-

tion which advocated overthrow of the government by force or violence. In both cases the Commission, after a hearing, denied renewal of the licenses because of the refusal to respond to the questionnaires. We set forth in our brief in opposition in the *Borrow* case the reasons why we believe the court below was correct in upholding the Commission against the attack that it was not authorized to ask the questions and that the questions infringed the petitioner's rights under the First Amendment. Brief in Opposition, No. 403, this Term. For the same reasons we believe that the decision below on this issue is correct.

The petitioner here attacks the opinion below also on the ground that he was denied due process under the Fifth Amendment. There is no substance to these objections. Certainly the Federal Communications Commission, in examining into the qualification of individuals for operators licenses, was authorized to proceed through inquiries specifically addressed to the individual applicant as well as through printed forms. 47 U.S.C. 403; 47 C.F.R. 1.71(a). Cf. *United States* v. *Morton Salt Company*, 338 U.S. 632, 641-643. This Court has held that the choice between proceeding by general rule or by *ad hoc* inquiry lies in the discretion of the administrative agency. *Securities and Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194. Here the petitioner was given notice and a chance to be heard. He was not refused the license because of information as to his loyalty or because of accusations against him, but because he refused to answer questions within the

competence of the Commission to ask. *Kimm* v. *Rosenberg*, 363 U.S. 405.

For these reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
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MAX D. PAGLIN,
General Counsel,

RUTH V. REEL,
Counsel,

Federal Communications Commission.

APRIL, 1961.

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